

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LAQUAN CASEY DURANT,

Defendant-Appellee.

UNPUBLISHED
December 2, 2003

No. 243023
Jackson Circuit Court
LC No. 02-001746-FH

Before: Cooper, P.J., and Markey and Meter, JJ.

COOPER, P.J. (*dissenting*).

I respectfully dissent from the majority opinion.

While the trial court cited sufficiency of the evidence in dismissing defendant's charges, it based this decision on the prosecution's statements during rebuttal argument that defendant admitted to police that he knew the items were stolen. As noted by the trial court:

Evidently, the prosecutor realized the gap in his case, and improperly said in final rebuttal argument not capable of being rebutted by the defense, reading from the [police] report, which he knows is not evidence and could not be evidence that the things taken from the house did not belong to him, thus covering up his gap, that, therefore, [defendant] would have known that these additional items taken from the house did not belong to him.

The record supports the trial court's finding that there was no evidence presented at trial that defendant knew the property taken from the house was stolen. A prosecutor may not make statements of fact to the jury that are unsupported by the evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

The trial court further stated its belief that the prosecutor literally falsified evidence and cited to the Code of Professional Responsibility:

Of course, under the Code of Professional Conduct 3.4: An attorney is not to falsify evidence, counsel, or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

Falsifying evidence is what occurred here with regards to providing evidence to the jury that had not been placed into evidence during the course of the trial.

The trial judge was so distressed with the prosecutor's blatant conduct that he requested that the prosecutor be reassigned to another courtroom.

On the facts of this case, I cannot say that the prejudice from the prosecution's argument could have been cured with a timely instruction. Knowledge that the items were stolen was an element of the crime charged. See MCL 750.110a(3). Here, the record shows that defendant went to the complainant's home with Sims to retrieve defendant's television. Although the jury could arguably have inferred that defendant knew the additional items taken from the home were stolen, the prosecutor's improper comments usurped the jury's role in this regard. The prosecutor's unrefuted and improper comments on a disputed element of the charged crime right before the jury began deliberations, were extremely prejudicial and denied defendant his right to a fair trial.

Accordingly, I believe that the trial court properly dismissed this case, given the prosecution's interjection of evidence not on the record during rebuttal argument and would remand for a new trial. See *People v Tait*, 99 Mich App 19, 29; 297 NW2d 853 (1980).

/s/ Jessica R. Cooper